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In the Matter of Arbitration Between THE STATE OF OHIO, DEPARTMENT OF TRANSPORTATION and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL-CIO	OPINION and AWARD Anna D. Smith, Arbitrator Case No. 31-12-(12-04-89)-55-01-06 Removal of John Ruolo

I. Appearances

For the State of Ohio:

Michael Duco, Advocate, Office of Collective Bargaining
Ed Morales, Second Chair, Office of Collective Bargaining
Robert Deems, Ohio Department of Transportation
Robert Orosky, Ohio Department of Transportation
Patrick J. Powers, Ohio Department of Transportation
Charles Schupska, Ohio Department of Transportation
William Tallberg, Ohio Department of Transportation
Michael K. Waggoner, Ohio Department of Transportation

For OSCEA/AFSCME Local 11:

Steven Leiber, Staff Representative and Advocate
John J. Ruolo, Grievant
Daniel Simens, Steward

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 10:45 a.m. on April 4, 1990 at the offices of the State of Ohio Office of Collective Bargaining, 65 East State Street, Columbus, Ohio before Anna D. Smith, Arbitrator. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at

the conclusion of oral argument, 2:30 p.m., April 4, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

> Did the Department of Transportation remove the Grievant, John Ruolo, from his position of Auto Service Worker 1 for Just Cause in accordance with Article 24 of the Agreement? If not, what should the remedy be?

IV. Stipulations

The Parties stipulated to the following facts:

1) Grievant was employed with the Department of Transportation as an Auto Service Worker from June 6, 1988 through December 1, 1989;
2) The case is properly before the arbitrator and free and clear of any procedural errors.
3) The radio log for October 1, 1989 does not show that the Grievant called in.
4) The Notification of Sick Leave Balance was not signed by the Grievant.

The following documents were received as joint exhibits:

1) State of Ohio/OCSEA Local 11 Contract, 1989-91;
2) Grievance Trail;
3) Discipline Trail;
4) Prior Discipline;
5) Directive A-301;
6) Performance Reviews of the Grievant, August 11, 1988 and August 11-October 3, 1988.

V. Relevant Contract Clauses

Article 24	Discipline
Article 29	Sick Leave
Article 43.03	Duration: Work Rules

VI. Case History

The Grievant in this case, John Ruolo, was hired by the Ohio Department of Transportation on June 6, 1988. Until the

time of his removal on December 1, 1989, he worked as an Auto Service Worker I in the Painesville Yard, Lake County, District 12. Although his performance evaluations in August and October of 1988 were satisfactory (Joint Exhibit 6), his attendance was irregular. By the end of April, 1989, he had exhausted his sick and personal leave (Employer Exhibit 4). He then began to use vacation time and to have authorized and unauthorized absences. On July 6, after returning from more than three weeks of continual absence including vacation, he improperly fueled an air compressor and received a written reprimand for minor neglect of duty. On August 1, he lost a set of keys and received a second written reprimand (Joint Exhibit 4). All the while he was frequently absent from work. On September 7, 1989, he was notified that he had used 80 hours of sick leave and that he was required to furnish a "physician's verification for future absences due to illness or injury" (Employer Exhibit 3). By the end of September he was close to exhausting his vacation allowance and had accumulated a number of unauthorized absences for which he received no discipline (Employer Exhibit 4). On September 27, he was notified that he was suspended for one day (effective October 11) for failure to follow policies, use of obscene, abusing and insulting language, and unauthorized use of a State vehicle (Joint Exhibit 4). On October 2, 3, and 4, the Grievant did not report to work (Employer Exhibit 1) and disciplinary action was requested by Lake County Superintendent Charles Schupska (Joint Exhibit 3). Grounds cited were Direc-

tive A-301, Violation 2c (Insubordination: Failure to follow written policies of the Director, Districts, or offices) and 16b (Unauthorized absence of 3 or more consecutive days). The Grievant did not report to work again on October 5, and on October 6, when he did report to work, he was two hours late. When asked for an explanation, he said he had been sick. He did not provide a physician's statement, either at this time or when given the opportunity again by the A-302 hearing officer or at the arbitration hearing. The radio logs for October 1-6, 1989 do not indicate any calls from the Grievant during the time he was absent (Union Exhibit 1 and Employer Exhibit 5). On October 11 he was notified of a pre-removal hearing on October 20 to investigate the charges of failure to follow policies and unauthorized absence of three or more consecutive days (Joint Exhibit 3). He subsequently entered treatment for substance abuse through the Employee Assistance Program, for which he was given leave. When he returned to work he appears to have been much more regular in his attendance (Employer Exhibit 4). On November 22, his removal order was issued, effective December 1, 1989 (Joint Exhibit 3). The discharge was timely grieved and processed to arbitration where it presently resides.

The work rules under which the Grievant was discharged were published as Directive A-301, May 1, 1987 (Joint Exhibit 5), which was posted on the bulletin board in the lunch room of the Painesville Garage. The call-in procedure was posted on

the same bulletin board on July 25, 1989 without notification to the Union. This Inter Office Communication (Employer Exhibit 2) is a revision to an existing procedure. The modification of July 25, 1989 consisted of the addition of two supervisors to the list of those authorized to receive call-ins for absences. The Inter Office Communication states in part, "Call ins to the watchman on duty are not acceptable. THERE WILL BE NO EXCEPTIONS. Failure to follow this policy will result in disciplinary action." This Inter Office Communication was also posted near the sign-out sheets by the front door to the garage and individually given to each employee. Receipt by each employee was not, however, documented. The Collective Bargaining Agreement also calls for notification of the immediate supervisor or designee when sick and unable to work (§29.03).

VII. Positions of the Parties

Position of the Employer

The State argues that by the seven-part test put forth by Carroll R. Daugherty in Enterprise Wire Co. (46 LA 359), the Employer had just cause to discharge John Ruolo:

1. The Grievant was aware of the consequences of his actions. Directive A-301 indicating rules and penalties for infractions is posted in the workplace. §29.03 of the Contract requires notification of supervisor when sick and unable to work. Moreover, anyone should know that being absent for four days in a row without notification or available leave would result in loss of job. Although the Employer cannot document

that the Grievant received a copy of the call-in procedure, it was posted in the workplace and it is unreasonable to expect the Employer to document the receipt of all notices to Employees. Regarding the Union's defense that the Grievant has a learning disability that prevents him from comprehending what he reads, the State asserts that it had no knowledge of this disability and it contends that it cannot be held responsible for something of which it was unaware.

2. The rule prohibiting three or more consecutive days of unauthorized absence is reasonable. To effectuate its responsibility to maintain the highway infrastructure, the State depends on regular attendance by its employees. Absenteeism results in the need to shuffle employees around and short staffing.

3. The Employer investigated the facts of the alleged rule violation. The log books and sign-in sheets support the testimony of Employer witness Schupska that the Grievant was not at work and did not call in. The Grievant alleges that he called in on October 1 in the evening and spoke to the watchman on duty, but the log does not substantiate the claim. Moreover, the watchman is not a supervisor or designee. Ruolo could have called Schupska at home, since he had his phone number and had used it before, but he did not do so. Additionally, the attendance records of the Grievant show that he had no leave left, and Schupska's testimony is that he offered no valid excuse for his absence when he returned to work on October 6. What is

more, had the Grievant reached a supervisor to request leave, the request would have been denied. The absence thus would have been unauthorized. The Grievant alleges that he called in the morning of October 6, as did his lawyer, Mr. Masterangelo. But the log shows no such calls and Mr. Schupska denies receiving calls from these people at this time. It being a payday, he would not have been in at the time they were supposed to have been placed anyway. Schupska also denies telling the Grievant that he was fired on October 6, before the pre-disciplinary hearing.

4. The Employer's investigation was fair inasmuch as it acted according to the facts which required only a brief investigation to establish.

5. The Employer has met its burden of proof based on the evidence.

6. The rules and penalties were applied evenhandedly as evidenced by the testimony of Robert Deems that numerous other employees have been removed for violation of Rule 16b.

7. The discipline is reasonably related to the seriousness of the offense and the Employee's record. Mr. Ruolo is a short-term employee with three prior instances of discipline on his record. He had been placed on notice regarding his leave usage and that a doctor's excuse would be required. Four consecutive days of absence, lack of call-in, and failure to provide an explanation suggest he does not care about his employment with the State.

The State asks the Arbitrator to disregard the Union's argument that the discipline be mitigated by the Grievant's participation in the Employee Assistance Program. First, it contends that §24.08 of the Agreement is permissive and the Employer is not obliged to disregard disciplinary action because of an employee's addiction. In this case the Employer is not even sure if the Grievant completed treatment. Moreover, the Grievant entered treatment only after threatened with job loss. His claim that he made the initial contact prior to the absences that gave rise to his discharge are unsubstantiated. Indeed, his entire testimony, filled with memory lapses that may be the result of drug use, must be considered unreliable.

In support of its position, the State offers Ohio Department of Transportation v. O.C.S.E.A. Local 11 Case No. 31-08-072289-67-01-06 (Redding), in which Arbitrator Pincus held that the totality of the grievant's conduct over three months created a critical mass which justified removal, and the removal was unmitigated by the employee entering an employee assistance program on which he failed to follow through.

The State therefore asks the Arbitrator to defer to the Employer's judgment regarding the appropriateness of the penalty, and sustain the discharge.

Position of the Union

The Union argues that the State did not have just cause to remove John Ruolo for several reasons. First, the Grievant was not aware of the consequences of his behavior. Neither he

nor the Union was aware of the change in the call-in procedure. The Union had not been informed of the rule change, in violation of §43.03 of the Agreement. When the Grievant did call in on the evening of October 1, he followed his accustomed practice of notifying the watchman on duty. Her reply was that there was nothing she could do about it. Since Ruolo had never been disciplined in the past for this procedure, he hung up thinking everything was all right. Although the log book does not show this or other calls made by the Grievant, this does not prove he did not make the calls since the log shows a pattern of lax recording. The Union also asserts that the Employer's failure to discipline prior absences of the Grievant led him to believe that again there would be no consequences. The Union further contends that the Employer ignored many of the Grievant's actions so as to set him up for removal.

Second, the Union argues that the Employer did not conduct a fair and objective investigation as witnessed by Mr. Schupska's statement to the Grievant that he was fired before the pre-disciplinary hearing.

Third, the Union contends that the Employer was not evenhanded in meting out discipline and it offers the testimony of Union Steward Simens that since Ruolo's discharge at least two other employees were not reprimanded for failing to report off to a supervisor.

Finally, the Union argues that the discipline received by the Grievant is not progressive or commensurate with the

offense. The Grievant's prior disciplinary record was of two written reprimands and a one-day suspension. Furthermore, the Employer showed a complete lack of understanding of the Grievant's problems and ignored his attempts to get into the Employee Assistance Program in violation of the spirit of §24.08 of the Collective Bargaining Agreement.

It asks that the Arbitrator sustain the grievance at least in part if not in whole.

VIII. Opinion

The Grievant here is charged with two offenses: insubordination by failing to report off properly and three consecutive days of unauthorized absence. At the outset it is necessary to discuss this employee's attendance record, for most of the Parties' evidence and argument becomes irrelevant once the facts of his record are considered. The Grievant's attendance record for 1989 was submitted in evidence as Employer's Exhibit 4. This shows that until the Grievant returned from treatment in October, there was not a week in which he worked the entire time as scheduled. He either used sick, personal or authorized leave, took vacation time or unauthorized leave. With this record it is remarkable that he was not disciplined or counseled for the same improper call-in and unauthorized absence infractions before the three-day absence beginning October 2. To be sure, he received a Notification of New Sick Leave Balance per Article 29 on September 7 (Employer's Exhibit 3), but it is not clear whether the meeting it refers

to ever took place or, if it did, what transpired. Otherwise, not so much as a reprimand was issued nor was any investigation initiated for any of the unauthorized absences beginning in June and occurring with increasing frequency in August and September. According to the Grievant's testimony, from the time he was hired he called in and reported his absences to whoever answered the phone. Yet he was never disciplined for improperly reporting off work.

Given this record, the Arbitrator can well understand the Employer's desire to terminate this employee. As it rightfully points out in its argument, the Department depends on regular attendance by its employees to accomplish its task of maintaining the State's highways. However, on evidence presented through both State and Union witnesses, it is clear that the Department has been lax in enforcing its absenteeism rule and call-in procedure at the Painesville Garage, at least with respect to this particular employee. Taking just the seven weeks prior to the three-day absence giving rise to the discharge, and counting the "UA" notations apparent to the Arbitrator on the Grievant's photocopied attendance card, the Employer had at least fourteen opportunities to apply corrective discipline. Unlike the Redding case cited by the Employer, none of these opportunities to correct the Grievant's behavior were taken and no explanation of this failure was offered at the hearing. Even assuming that the Grievant knew of the rules laid down in Directive A-301, the Employer's lax enforcement

condoned the Grievant's repeated violation of Rule 16 and led him to believe that nothing would happen to him when he again did not report to work on October 2, 3, 4 and 5. If the Employer had overlooked a prior isolated incident of unauthorized absence and failure to report off properly, this would not have had the same effect and one might reasonably conclude that the Grievant knew or ought to have known that an extended authorized absence put his job at risk, but this is not the case here. Rather, I must conclude that the Employer's failure to correct the Grievant's prior absenteeism with progressive discipline allowed it to continue and increase in frequency. The Employer's disregard of the Grievant's prior absenteeism thus contributed to the problem of a critical mass of offenses the Employer now seeks to solve with removal. Discharge is an inappropriate disciplinary action here because the Employer ignored the Grievant's poor record as it developed. While the Employer may not have intended to set the Grievant up for discharge, the effect was the same.

Having held that the Grievant had no forewarning that discharge could result from his actions, it remains to be decided whether any discipline is called for. As stated above, the rule prohibiting unauthorized absences is reasonable. It is clear that regardless of the call-in procedure called for or actually used, the Grievant was absent from work during the period in question and that this absence was not authorized. In view of the Grievant's prior disciplinary record, a major

suspension is called for. Mr. Ruolo must also be made aware that further rule infractions could cost him his job. Additionally, because his record is consistent with that of substance abuse and he admits to having had a problem, the probable underlying cause of his poor work record needs to be addressed. It is difficult to believe that Mr. Ruolo's brief exposure to the Employee Assistance Program in October was sufficient by itself to sustain a stable recovery. Moreover, his demeanor in the hearing was strongly indicative of a largely untreated disease. I am therefore making his reinstatement and continued employment contingent on his following the recommendations of his Employee Assistance counselor.

IX. Award

The grievance is denied in part, sustained in part. The Employer did not have just cause to remove John Ruolo, but did to discipline him. Accordingly, the discharge is reduced to a ten-day suspension without pay or benefits. The Grievant is to be reinstated to his former position contingent upon him hereafter following the advice of his Employee Assistance Program counselor. Mr. Ruolo will provide such evidence of compliance as the Employer may reasonably require. Back pay is to be reduced by such interim earnings as the Grievant may have had and he is to supply the Employer with such evidence of earnings as it may require. Mr. Ruolo is also put on notice that a further unauthorized absence could result in his removal.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
April 23, 1990